IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ELCON CONSTRUCTION, INC.,	)	**No. 27201-0-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
EASTERN WASHINGTON UNIVERSITY,	)	**UNPUBLISHED OPINION**
	)	
Respondent.	)	
	)	

Brown, J. ── Elcon Construction, Inc. appeals the trial court's summary dismissals of its tort claims against Eastern Washington University (EWU) arising from the parties' well drilling contract, and the court's refusal to grant pre-award interest on Elcon's arbitration award against EWU. Like the trial court, we hold that the economic loss rule precludes Elcon's tort claims arising from the contract. We agree with the trial court that it lacked jurisdiction over the pre-award interest claim because it was an issue for arbitration under the contract. Accordingly, we affirm.

FACTS

EWU uses two campus wells for its water supply. The first well is 512 feet deep

and pumps approximately 330 gallons per minute (gpm) and the second well is 561 feet deep and pumps approximately 450 gpm. The wells draw water from the Wanapum aquifer. Wanting to increase its water capacity, EWU hired engineers Varela & Associates for a water capacity study in 2000. Varela, in turn, hired Golder & Associates to perform a hydrogeological investigation. The "Golder Report" suggested a new well be built in the Grande Rhonde aquifer below the Wanapum aquifer "from about 700 to 1,500 feet below ground surface." Clerk's Papers (CP) at 338. The Golder Report acknowledged it would be a less expensive alternative to drill into the Wanapum aquifer, and opined that either alternative could satisfy EWU's needs.

In 2003, the Department of Ecology (DOE) approved EWU's long-standing application to consolidate its existing water rights, permitting pumping of 900 gpm. DOE permitted refurbishment of existing wells, which included drilling in the "immediate proximity" of the existing wells. CP at 303. EWU decided to drill replacement wells near the existing wells to increase its water supply to 900 gpm. EWU began accepting bids for the job. EWU did not believe the Golder Report's Grande Rhonde alternative was relevant since it wanted to refurbish its existing wells and consolidate its water rights.

Also in 2003, Elcon successfully bid for "Wells 1 & 2 Refurbishment" by drilling two 750 feet wells. Elcon certified it had, "investigated and satisfied itself as to the general and local conditions which can affect the Work or its cost, including . . . (d) the

conformation and conditions of the ground; and (e) the character of equipment and facilities needed preliminary to and during the performance of the Work." CP at 313. EWU agreed to pay Elcon $1,516,635 for the well work.

As construction progressed, Elcon had increased difficulty in drilling near Well 1. Elcon did not have the equipment to drill significantly deeper than 750 feet. Elcon refused to continue drilling unless EWU assumed the risk of damage to its equipment. In April 2004, EWU terminated its contract with Elcon for convenience and requested a final pay request. Elcon submitted its pay request, which EWU disputed. Based on later discovered damage information to Well 1 derived from a high-resolution video, EWU changed its termination claim from convenience to for cause. EWU notified Elcon by letter of its change from convenience to for cause. It provided Elcon's bonding company a copy of this change letter.

Elcon sued for breach of contract and later amended to add several tort claims, including defamation, publication in a false light, fraud, and tortious interference with a contractual relationship. Elcon also requested "prejudgment interest as provided for by law." CP at 33. The parties' contract required arbitration of the contract claims. The arbitrator rejected EWU's for cause argument and awarded Elcon $891,202.70, noting that EWU already paid Elcon $946,293.36. After the arbitrator filed its decision, Elcon requested prejudgment interest. The arbitrator denied its request, concluding he lacked post-final-award jurisdiction to make such an award.

Relying mainly on the economic loss rule, EWU eventually succeeded in gaining summary dismissals of Elcon's tort claims arising out of the parties' contract. Further, the trial court denied Elcon's request for prejudgment interest, noting it lacked jurisdiction in view of the contract's arbitration provisions. Elcon appealed.

ANALYSIS

A. Summary Judgment

The issue is whether, considering the economic loss rule, the trial court erred in summarily dismissing Elcon's tort claims.

On review of an order for summary judgment, this court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.,* 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp,* 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Our review is de novo. *Id.* Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400,* 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.,* 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). We will grant summary judgment if reasonable persons could

reach but one conclusion from all the evidence. *Vallandigham,* 154 Wn.2d at 26 (citing *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

Washington's economic loss doctrine prohibits plaintiffs from recovering purely economic damages in tort when the plaintiffs' entitlement to the damages is based in contract. *Alejandre v. Bull*, 159 Wn.2d 674, 683, 113 P.3d 1039 (2005). "[T]he purpose of the economic loss rule is to bar recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic losses." *Id.* A clear distinction between the remedies available in tort and contract claims with respect to economic loss encourages the parties to allocate risk and prevents a party to a contract from obtaining benefits that were not part of the bargain. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1,* 124 Wn.2d 816, 826-27, 881 P.2d 986 (1994); *Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 203, 194 P.3d 280 (2008). The court in *Berschauer/Phillips* held, "[W]hen parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in [Restatement (Second) of Torts, § 552 (1977)] and, thus, purely economic damages are not recoverable." *Id.* at 828.

Here, Elcon's damages are the same as those claimed as compensatory under the contract. Moreover, the conduct complained of is not extraneous to the contract but a significant part of the contract. The parties agreed to the general conditions, which allocate responsibility to Elcon for determining foreseeable subsurface condition. This

holding is consistent with two recent Division Two cases. *See Cox v. O'Brien*, 150 Wn. App. 24, 35, 206 P.3d 682 (2009) (economic loss rule bars fraudulent representation claim against seller for pest damage); *Jackowski v. Borchelt*, ___ Wn. App. ___, 209 P.3d 514, 520 (June 16, 2009) (economic loss rule bars negligent misrepresentation claim against sellers after landslide damaged home).

Relying in part on the Golder Report, Elcon argues EWU's actions amount to fraud in the inducement and that such claims are an exception to the economic loss rule. The Golder Report, drafted several years before EWU contracted with Elcon, related to a plan for increased water capacity (drill a large well into the aquifer below the currently used aquifer) distinct from the plan EWU chose to pursue (refurbish the two existing campus wells) in the higher Wanapum aquifer.

Nonetheless, even assuming EWU's actions amount to fraud in the inducement, our Supreme Court noted in a footnote in *Alejandre*, "Other courts recognize a limited exception to the economic loss rule for fraudulent misrepresentation claims that are independent of the underlying contract (sometimes referred to as fraud in the inducement) but only where the misrepresentations are extraneous to the contract itself and do not concern the quality or characteristics of the subject matter of the contract or relate to the offending party's expected performance of the contract." *Alejandre*, 159 Wn.2d at 690 n.6 (citing *Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.,* 209 Mich. App. 365, 532 N.W.2d 541 (1995); *Marvin Lumber & Cedar Co. v. PPG*

Indus., Inc., 223 F.3d 873, 884-87 (8th Cir. 2000)). The court declined to make such ruling in Washington.

Accordingly, we hold Elcon's tort claims are barred by the economic loss rule. Based on this holding, this court need not address Elcon's remaining arguments regarding fraud, intentional interference with a business expectancy, and publication in a false light. *See Lake v. State Farm Mut. Auto. Ins. Co.,* 127 Wn. App. 114, 117, 110 P.3d 806 (2005) (courts need only address dispositive issues).

B. Pre-award Interest

The issue is whether the trial court erred in denying Elcon's request to modify the arbitration award to grant pre-award interest.

"Washington courts accord substantial finality to arbitration decisions rendered under [former] chapter 7.04 RCW."[1] *In re Point Allen Serv. Area v. Dep't of Health,* 128 Wn. App. 290, 303, 115 P.3d 373 (2005). The superior court was limited to confirming, modifying, or correcting the arbitrator's award on limited statutory bases. *Barnett v. Hicks,* 119 Wn.2d 151, 156, 829 P.2d 1087 (1992). Review on the arbitration merits is not permitted. *Id.* at 156-57. Our review of the arbitration award is confined to the

[1] Former chapter 7.04 RCW was repealed by Laws of 2005, chapter 433, section 50, and recodified as chapter 7.04A RCW, the 2005 Uniform Arbitration Act. The former chapter applies here because the arbitration was commenced before the new statutory scheme was effective on January 1, 2006. RCW 7.04A.900. The 2005 Uniform Arbitration Act "does not affect an action or proceeding commenced or right accrued before January 1, 2006." RCW 7.04A.903.

same scope as the trial court's review. *Id.* at 157.

The trial court could modify or correct the arbitration award solely on grounds of "evident miscalculation of figures, or an evident mistake in the description of any person, thing or property," or "imperfect[ion] in a matter of form, not affecting the merits of the controversy." Former RCW 7.04.170(1), (3) (1943); former RCW 7.04.175 (1985).

RCW 39.76.010(1), in relevant part provides: "Except as provided in RCW 39.76.020, every state agency . . . shall pay interest at the rate of one percent per month, but at least one dollar per month, on amounts due on written contracts for public works . . . whenever the state agency . . . fails to make timely payment." Prejudgment interest, however, does not apply to, "*Claims subject to a good faith dispute*, when before the date of timely payment, notice of the dispute is: (a) Sent by certified mail; (b) Personally delivered; or (c) Sent in accordance with procedures in the contract." RCW 39.76.010(1) (emphasis added).

In *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 401, 766 P.2d 1146 (1989), a property owner appealed a superior court order, which confirmed an arbitration award, but added prejudgment interest. Division Two of this court deleted the prejudgment interest, holding that the court, "had no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits of the controversy, forbidden territory for a court." *Id.* at 404. Similarly, here, the trial

court had no basis to assess prejudgment interest.

Relying on *Phillips Building Company, Inc. v. An*, 81 Wn. App. 696, 701, 915 P.2d 1146 (1996), Elcon argues the court should have awarded prejudgment interest because the arbitrator exceeded his authority in failing to do so. The *Phillips* court held, "Arbitrators may exceed their authority by failing to award attorney fees to the prevailing party under an arbitration agreement." *Id.* However, the court ultimately held that because the prevailing party could not be determined on the face of the arbitration award, the court properly declined to modify the award to include attorney fees. *Id*. Similarly, here, it cannot be determined on the face of the award whether prejudgment interest is justified based on the good faith dispute exception in RCW 39.76.010(1). Under *Westmark* and *Phillips*, the trial court properly declined to award prejudgment interest.

Lastly, Elcon asks us to direct the trial court to direct the arbitrator to reconsider its decision regarding prejudgment interest. Elcon fails to cite persuasive legal authority to justify its request. Furthermore, under RCW 39.76.010(1), it is unlikely interest would be awarded since EWU notified Elcon in April 2004 that it would be terminating the contract and requested a final pay request and the pay request was disputed, which led to arbitration.

C. Attorney Fees

Both parties request attorney fees. Elcon requests fees under RCW 39.76.040.

This statute states, "In any action brought to collect interest due under this chapter, the prevailing party is entitled to an award of reasonable attorney fees." Since Elcon did not prevail on the prejudgment interest issue, its request is denied. EWU requests attorney fees under RAP 18.1. Since it fails to cite "applicable law," warranting such an award, EWU's request is denied. RAP 18.1.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Schultheis, C.J.

Sweeney, J.